Supreme Court, U.S.
DEC 2 6 1993

No. 92-1236

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

UNIT RIG INC., TEREX CORPORATION,
AND MRL ACQUISITION CORPORATION,

Petitioners,

v.

JOHN W. WHALEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

REPLY TO BRIEF IN OPPOSITION 1

REPLY TO QUESTIONS PRESENTED FOR REVIEW AND REPLY TO SUMMARY OF REASONS FOR DENYING PETITIONERS' REQUEST 2

REPLY TO REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 7

REPLY TO STATUTORY AND REGULATORY PROVISIONS 8

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Cano v. United States Postal Service, 755 F.2d 221 (1st Cir. 1985) 8

Foster v. National Bank of Bossier City, 857 F.2d 1058 (5th Cir. 1988) 3

Great American Federal Saving & Loan v. Novotny, 442 U.S. 366 7

Jones v. Baskin, Flaherty, Elliot and Mannino, 738 F. Supp. 937 (W.D. Pa. 1989) 8

Lorillard v. Pons, 434 U.S. 575 9

Oscar Mayer & Co. v. Evans, 441 U.S. 750 9

Spencer v. Banco Real, S.A., 87 F.R.D. 739 (S.D. N.Y. 1980) 7

Steffen v. Meridian Life Insurance Co., 859 F.2d 534 (7th Cir. 1988) 4

Whalen v. Unit Rig, Inc., 974 F.2d 1248 (10th Cir. 1992) 8

FEDERAL STATUTES

29 U.S.C.A. §626(d) 9

42 U.S.C.A. §2000e-5 1,8,9

FEDERAL REGULATIONS

29 C.F.R. §1601.9 9

29 C.F.R. §1601.12 9

29 C.F.R. §1626.6 9

29 C.F.R. §1626.8(b) 3,9

Reply to Brief in Opposition

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, a reply is necessary to address arguments first raised in Respondent's Brief in Opposition and to address other misstatements, misrepresentations and misleading arguments contained in Respondent's Brief.

Petitioners respectfully disagree with Respondent's contention that Petitioners incorrectly included the citation to 42 U.S.C.A. § 2000e-5 in the Petition for Writ of Certiorari under "Statutory And Regulatory Provisions." See Respondent's Brief at p. 2. This Court has held that it is proper to apply case law developed under Title VII to analogous situations arising under the ADEA. See infra at pp. 9-10. Petitioners cited Title VII cases which involved filing requirements to demonstrate the difference now existing among the circuits where the employee relies only on an "Age Complaint Intake Questionnaire" ("Intake Questionnaire"), and an "Age Complaint Affidavit" ("Affidavit") but fails to allege a proper charge in the "Age Official Complaint Form" ("Official Complaint").

Respondent suggests that the filing requirements of charges under the ADEA are in "stark contrast to the rigid requirements of Title VII." See Respondent's Brief at p. 9. A comparison of the statutory and regulatory provisions reveals that the provisions relating to filing procedures for ADEA and Title VII are virtually identical with few exceptions, notably, the requirement of a right to sue letter in Title VII cases before filing an action in the district court, as opposed to a 60 day waiting period in ADEA cases from the date of the filing of a charge with the EEOC. See infra at pp. 9-10. The forms of the filing documents provided by the OHRC, i.e., Intake Questionnaire, Affidavit, and Official Complaint, forms are identical whether the charge is under the ADEA or Title VII. The regulations relating to the form of the charge are different only in that the Title VII charge must be verified. See infra at pp. 9-10. Incidentally, the Age

Complaint Affidavit form furnished by OHRC to Respondent was verified.

Keeping in mind that Respondent was represented by experienced counsel, (see infra at pp. 7-8) it is undisputed that in the Intake Questionnaire Respondent stated that "he was terminated from employment of Unit Rig and Equipment Company" ("URE") (emphasis added). In his Affidavit, Respondent stated the alleged discriminatory action was his "discharge" from URE as an accountant because URE, MRL Acquisition Corporation ("MRL"), Terex Corporation ("Terex"), and Unit Rig "acted in concert to unlawfully terminate (his) employment on the basis of [his] age." In his Official Complaint filed with OHRC after he commenced his action in federal court, Respondent only named his former employer, Unit Rig and Equipment Company, and stated only that he "was discharged from [his] position as controller" for age discrimination. (emphasis added)

Reply To Questions Presented For Review And Reply To Summary Of Reasons For Denying Petitioners' Request

The mandate of Congress with respect to the requirements of the ADEA for notice and settlement of disputes through conciliation, conference and persuasion and the difference in the circuits requiring compliance therewith are discussed in the Petition for Writ of Certiorari. By granting the Petition for Writ of Certiorari this Court will be setting the standard for litigants, lawyers and courts in all circuits to carry out the mandate of Congress with respect to the "conditions precedent" to filing an action under the ADEA in the federal courts. This Court's direction is needed to ensure equal protection under the law that only after notice of the charge to prospective defendants and after the opportunity for settlement of disputes through conciliation, conference and persuasion will a civil action be commenced under the ADEA.

In Respondent's Brief in Opposition, he contends that Petitioners' request for a writ of certiorari should be denied because the Tenth Circuit, in affirming the judgment of the district court, correctly and consistently applied the law and regulations governing administrative filing requirements under the ADEA to the findings of fact made in the district court. See Respondent's Brief at p. 5. That statement is not correct for the reason that neither the district court nor the appellate court, nor the Respondent in his Brief, discussed the charge contained in the Official Complaint in this case and the distinction between the Official Complaint charge and the charge contained in the Intake Questionnaire and Affidavit. The Official Complaint charge in this case is insufficient to meet the minimal conditions precedent to filing an action in the Seventh Circuit under Steffen and other circuits which are in conflict with the Tenth Circuit on this issue. See Petition for Writ of Certiorari at pp. 12-14.

Respondent criticizes Petitioners' reliance on the case law and regulations relating to Title VII and summarily dismisses the issue with respect to Respondent's OHRC documents with the statement that "all that is required of Plaintiff under the ADEA is to file a charge in writing identifying the prospective respondents and generally describing the acts alleged to be discriminatory." (emphasis added) (citing 29 C.F.R. § 1626.8(b) and Foster v. National Bank of Bossier City, 857 F.2d 1058 (5th Cir. 1988)). See Respondent's Brief at p. 6. This argument would be appropriate in a case where the issues relate to timely filing, as in Foster, but misses the mark where, as in the instant case, the Official Complaint charge fails to both identify the prospective respondents and to describe the acts, generally or otherwise, which are alleged to be discriminatory.

In Foster the complainant without legal representation wrote a letter to the EEOC setting forth information with respect to his claim under the ADEA. Foster precedential authority is limited solely to the issue of timely filing of the

charge. The court only "determined that Foster filed a timely charge as required by the ADEA." See 857 F.2d at 1061.

In Steffen v. Meridian Life Insurance Co., 859 F.2d 534 (7th Cir. 1988), the court addressed the issue concerning the difference between the charge contained in the Intake Questionnaire and Affidavit and the charge contained in the Official Complaint. The court decided two issues; one was "whether Steffen satisfied the ADEA's charge-filing requirement," (Id. at 541) so as to determine whether Steffen had filed his charge with the EEOC within the limitation period after the alleged discriminatory act occurred. Id. at 542. The court also decided whether Steffen's retaliatory discharge claim failed as a matter of law because it did not fall within the scope of the charge Steffen filed on December 1, 1983 in his Official Complaint. Id. at 544. The court stated as follows:

> The purpose of the charge-filing requirement is to provide the EEOC with sufficient information to notify an employer that it has been charged with discrimination and to provide the EEOC with the opportunity to investigate the alleged unlawful practice as well as to provide the EEOC with the opportunity to eliminate any unlawful practice through informal conciliation.

The court held that for purposes of timely filing, Steffen's Intake Questionnaire contained enough information to satisfy the regulations in that it named the respondent and stated that he was demoted because of his age. The court further stated:

> Contrary to Steffen's arguments, however, the EEOC's regulations make clear that, while a charge is "sufficient" if it names the respondent and generally alleges discrimination, not all documents containing such information are charges. The court also noted:

> Under Steffen's interpretation of the regulations, virtually every completed Intake Questionnaire (and probably most phone messages) would fall within the definition of a charge. But the EEOC does not routinely treat Intake Questionnaires as charges.

With respect to the Official Complaint charge the court held that Steffen's retaliation claims did not fall within the scope of the charge submitted to the EEOC; that in filling out his charge, he checked the box marked "Other" and specifically wrote in "Age,"; and, that he complained in the body of the charge that he had been replaced by a younger man and later terminated, all because of his age.

Steffen is instructive on the issues in the instant case and clearly states the law in the Seventh Circuit and other circuits, which is in conflict with the Tenth Circuit decision in this case. See Petition for Writ of Certiorari at pp.15 and 16.

In the second paragraph on Page 1 of Respondent's Brief in Opposition he states that the issues decided by the trial court and affirmed by the Tenth Circuit were solely on the basis of the unique facts and circumstances present in this case and that the decision is of no real significance in the administration of future ADEA claims and has little or no precedential value.

Contrary to Respondent's assertion, the "unique facts and circumstances" which this Court must consider relate to the lower courts' interpretation of the conditions precedent to filing a lawsuit under ADEA and the Tenth Circuit's decision in this case, which is in conflict with the other circuits. See Petition for Writ of Certiorari at pp. 12-19.

The following facts and issues that were not addressed by the lower courts nor by Respondent in his Brief are: (1) that Petitioners had no notice of the administrative proceedings; (2) had no opportunity to settle this dispute through conciliation, conference and persuasion; (3) were not named or charged as a Respondent in the Age Official Complaint Form; (4) the Respondent was represented by experienced

lawyers in the administrative proceedings; (5) that each document complained only of discharge, an impossibility for Petitioners who never employed Respondent; and, (6) Respondent's Age Official Complaint Form was prepared and filed by Respondent with the help of his lawyers. Respondent mistakenly believes the above facts and issues to be of no significance to this Court.

The significance of the above facts and issues is demonstrated by the trial court's questioning of Respondent's attorneys regarding the notice issue. [1]

The importance to Petitioners and others faced with these same facts and issues is that in the Seventh Circuit under Steffen and in other circuits, Respondent's case would have been dismissed. Now, in the Tenth Circuit under the decision in the instant case, the foregoing conditions precedent to filing an action under the ADEA are not required.

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[1] **MR. CREMIN**: Your Honor, one other document -- I hate to keep adding this -- but this shows that he said Walter Jackson laid him off, and it's more to the effect of who would have been getting this information.

THE COURT: That will be added as Court's Exhibit No. 7 so an appellate court can see what was going on in reference to the confusion of why the OHRC and the EEOC is told about the potential age discrimination claim against MRL Acquisition Corp., Terex and Unit Rig, Inc. but none of those organizations or companies were advised of it.

Before we leave this subject, since throughout this time, as I understand it, Mr. Mann, your client Mr. Whalen was being represented by your law firm, by you and Mr. Nelson -- am I correct in that?

MR. MANN: Yes, sir, that is correct.

THE COURT: Why weren't any of these documents that were sent to OHRC and sent to EEOC relative to MRL Acquisition Corporation, Terex and Unit Rig, Inc., why weren't any of those sent to those entities? Why didn't you just make a copy of them and send them over to them whether the EEOC did it or not?

MR. MANN: Your Honor, I've handled a lot of these, usually on the defendant's side. My client has never ever received a charge of discrimination from any complaining party. The way this works is you go down to the --

THE COURT: I don't care what your client's ever received.

Reply To Reasons For Denying The Petition For Writ Of Certiorari

Respondent's arguments under this section that "both lower courts did consider the Petitioners' arguments concerning the sufficiency of Respondent's charge and rejected each and every one," is not supported by the facts and law in this case. Neither of the lower courts nor Respondent addressed the issues relating to the Official Complaint charge. The only issues addressed by the lower courts with respect to the OHRC filing documents were limited to the Intake Questionnaire, Affidavit, and letter of Rosenstein, Fist & Ringold to OHRC dated October 31, 1988. See Respondent's Brief at p. 9. These documents without the Official Complaint may meet the timing requirements under the ADEA, but do not meet the charge requirements for the Official Complaint under the ADEA in the Seventh Circuit under Steffen and in other circuits. See Petition for Writ of Certiorari at pp. 12-19.

In fact, the Intake Questionnaire, Affidavit, and letter from counsel without the Official Complaint are insufficient upon which to later state a legal action under the ADEA. The charge asserted by Respondent in the Affidavit submitted as part of the Intake Questionnaire was couched in terms of a conspiracy between Petitioners and URE, who Respondent claims "acted in concert to unlawfully terminate [his] employment on the basis of [his] age."[2] Conspiracy to violate the ADEA is not a proper charge under the ADEA.[3]

Additionally, Respondent misstates Petitioners in suggesting that "Petitioners ask this Court to hold that a 'charge' under the ADEA cannot be made without the filing of an Official Complaint." (emphasis added). See Respondent's Brief at p. 9. Respondent's statement begs the

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[2]There is no dispute as to the language in the Intake Questionnaire and Affidavit.

[3]See Great American Federal Savings-Loan v. Novotny, 442 U.S. 366 (1979); Spencer v. Banco Real, S.A., 87 F.R.D. 739 (S.D. N.Y. 1980).

question because Respondent did file the Official Complaint with the help of his lawyer as pointed out in the Petition for Writ of Certiorari.[4]

In support of his contention that both lower courts considered the Petitioners' arguments concerning the sufficiency of Respondent's charge and rejected each and every one, Respondent quotes the findings of the trial court which were adopted by the Tenth Circuit in its order on Petition for Rehearing.[5] Despite its being raised in the Motion for Summary Judgment and for Directed Verdict, no reference by the trial court is even made to the lawyer assisted Official Complaint filed with OHRC. The blame for the OHRC's failure to notify Petitioners that they had been charged with discrimination under the ADEA was directed at the agency even though the Respondent was represented by counsel experienced in ADEA and Title VII matters and never made any complaint about the only action which Petitioner could have taken, i.e., refusal to hire.

Reply To Statutory and Regulatory Provisions

Respondent contends that Petitioners incorrectly include 42 U.S.C.A. § 2000e-5 (Title VII) under "Statutes And Regulations Involved." Respondent agrees "that courts have applied case law developed under Title VII to analogous situations arising in employment discrimination suits brought

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[4]See Petition for Writ of Certiorari at 16 footnote 2; see also Cano v. United States Postal Service, 755 F.2d 221 (1985) and Jones v. Baskin, Flaherty, Elliot and Mannino, 738 F. Supp. 937 (W.D. Pa. 1989) (1st Cir. 1985).

[5]Whalen v. Unit Rig, Inc., 974 F.2d 1248 (10th Cir. 1992). In its opinion filed September 2, 1992 the court refused to address the "legal sufficiency of the documents Mr. Whalen filed with the OHRC . . . [b]ecause the issue was not properly raised below." Id. at 1251. In its order on Petition for Rehearing the court first conceded that it had erred and the issue was raised below but then concluded "that the trial court was correct in its analysis and conclusion contained in its Order on pages one through seven." Id. at 1254.

under the ADEA," but not "where clearly different procedures exist." (Citing Lorillard v. Pons, 434 U.S. 575, 584, (1978) where the court held that "in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant difference.") See Respondent's Brief at p. 2. In Lorillard, the court also stated that "[t]here are important similarities between the two statutes, to be sure, both in their aims -- the elimination of discrimination from the workplace -- and in their substantive prohibitions."[6]

Because Petitioners cite Title VII cases in support of issues raised in the Petition for Writ of Certiorari, 42 U.S.C.A. § 2000e-5, was included under "Statutes And Regulations Involved" to demonstrate the "important similarities" between the provisions of Title VII and 29 U.S.C.A. § 626(d) (ADEA) which contain provisions relating to "Filing of charge with Commission; timeliness; conciliation, conference, and persuasion." Both § 626(d) and § 2000e-5e require the filing of a charge by a person claiming unlawful discrimination by an employer. Both acts require that the Commission notify all persons named in such charge. Both acts require the Commission to "seek" or "endeavor to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."

With respect to the "Form of charge" and "Contents of charge; amendment of charge," the provisions in the Code of Federal Regulations for ADEA (§ 1626.6 and § 1626.8) are substantially the same as Title VII (§ 1601.9 and § 1601.12), except that Title VII requires the charge to be verified.[7]

Because the issues before this Court relate to the "charge" and the opportunity for "conciliation, conference and persuasion," Title VII cases on these issues are cited by Petitioners. Indeed, Respondent cites Title VII cases in

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[6]434 U.S. at 584; See also Oscar Mayer & Co. v. Evans, 441 U.S. 750, (1979).

[7]See Petitioners' Brief, pp. 3, 4 for § 1626.6 and 1626.8; Title VII.

support of his arguments in opposition to the Petition for Writ of Certiorari.

Conclusion

Contrary to Respondent's assertion, Petitioners' Statement of the Case in the Petition for Writ of Certiorari clearly sets forth the issues to be decided by this Court and demonstrates the importance of this Court granting the Petition for Writ of Certiorari.

Petitioners respectfully submit that for the reasons stated herein and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

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